

# MEDICAL BOARD OF CALIFORNIA

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*Protection of the public shall be the highest priority for the Medical Board of California in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.*

— Business and Professions Code § 2000.1

The Medical Board of California (MBC) is a consumer protection agency within the state Department of Consumer Affairs (DCA). The primary purpose of MBC is to protect consumers from incompetent, grossly negligent, unlicensed, impaired, or unethical practitioners by responding to complaints from the public and reports from health care facilities and other mandated reporters. MBC reviews the quality of medical practice carried out by physicians and surgeons and enforces the disciplinary, administrative, criminal, and civil provisions of the Medical Practice Act, Business and Professions Code section 2000 *et seq.* MBC also provides public record information about physicians to the public via its website and individual requests and educates healing arts licensees and the public on health quality issues. The Board's regulations are codified in Division 13, Title 16 of the California Code of Regulations (CCR).

MBC is responsible for ensuring that all physicians licensed in California have adequate medical education and training. In this regard, the Board issues regular and probationary licenses and certificates under its jurisdiction, administers a continuing medical education program, and administers physician and surgeon examinations to some license applicants. MBC also oversees

the regulation of licensed midwives; polysomnographic technologists, technicians, and trainees; research psychoanalysts; and medical assistants.

The fifteen-member Board consists of eight physicians and seven public members. MBC members are appointed by the Governor (who appoints all eight physicians and five public members), the Speaker of the Assembly (one public member), and the Senate Rules Committee (one public member). Members serve a four-year term and are eligible for reappointment to a second term. Several standing committees and ad hoc task forces assist the Board.

On February 2, 2021, Governor Newsom [appointed](#) Ryan Brooks of San Francisco as a public member of the Board. Mr. Brooks has been Executive Vice President of Government Affairs at Outfront Media since 2002 and previously served as a public member of the California Board of Pharmacy.

At this writing, the Board has two public member vacancies, one which must be filled by Governor Gavin Newsom and the other by the Speaker of the Assembly.

## HIGHLIGHTS

### **Senate Rules Committee Confirms Appointment of Three Board Members, Looks to Possible Legislation Adding Two More Public Members**

On February 3, 2021, the Senate Rules Committee held a hearing to confirm the Governor's appointments of three members to MBC, Dev GnanaDev, Asif Mahmood, and Richard Thorp, all practicing physicians. After a brief introduction by all three Board members, Senate President Pro Tempore Toni Atkins called for comments from other committee members, who proceeded to pose significant questions with respect to a potential conflict between the Board's obligation to ensure consumer safety and the interests of the licensed physicians the Board regulates.

Of note, Senator Patricia Bates posed questions about the disciplinary actions taken against physicians who have been accused of overprescribing opioids to patients and the inefficiency of the current Death Certificate Project undertaken by the Board. Senator Bob Hertzberg voiced concern regarding the average length of 900 days between a filed complaint and the Board's adjudicative decision in response to the complaint and the disproportionate amount of Latino and African American physicians receiving complaints filed against them.

Senator Scott Wilk asked the Board for possible ways to allow for real-time status updates when a complaint is filed and add a point of contact for updates on the filed complaint. In response, Dr. Thorp claimed that, as it stands right now, the disciplinary process is lengthy due to the large number of steps and procedures needed to process the complaint properly. Furthermore, Dr. Mahmood mentioned the Medical Board's app available to all consumers, which allows them to check their doctors' disciplinary status, and noted that only 13,000 users downloaded the app as of the hearing and advocated for a campaign to bring more awareness to the app. Senator John Laird's inquiry focused on the medical industry's influence over the Board and its decision-making and the possible conflict of interest that entails. President Pro Tem Atkins echoed a similar sentiment and questioned whether the Board was capable of doing the kind of thorough investigations sought by the inquiring senators.

The Committee also heard from several members of the public opposing the confirmation of these physician members of the Board and raising concerns about conflicts in protecting doctors rather than patients. Many of the callers had family members who had been injured or had been injured themselves by doctors and contributed an overall sense that the public has lost its trust in the ability of the Board to protect patients.

After the series of questions posed by the senators and public comment, President Pro Tem Atkins further addressed the possible breach of trust to the public in favor of physician interest and sought comments from the three Board members on that subject in their closing statements. In her closing remarks, she also suggested possible future legislation that would add two public members to the Board, which would create a public member majority. She stated she would discuss this further with the policy committees involved in the Board's Sunset Review. Ultimately, the Rules Committee voted to confirm all three Board members on March 22, 2021.

## **Board Undergoes Contentious Sunset Review**

On December 1, 2021, MBC published its [Sunset Review Report](#) in preparation for its Sunset Review Oversight Hearing before the Assembly Business and Professions Committee and the Senate Business, Professions and Economic Development Committee. The Board's enabling act, section 2000 et seq. of the Business and Professions Code, is scheduled to "sunset" or be repealed on January 1, 2022, if it is not extended during sunset review.

MBC's report includes a summary of the Board's activities over the past four years, updates the legislature regarding issues raised during its previous sunset review, and identifies 10 new issues the Board would like the legislature to consider during this sunset review period. Of note, the Board seeks a significant fee increase and statutory maximum reserve amount (Issue #1), the reinstatement of its ability to recover costs from disciplined physicians and surgeons (Issue #2), and a series of enforcement enhancements such as improved communication and collaboration with investigators, a tolling of the statute of limitations for subpoena enforcement, enhanced inspection powers, non-adversarial enforcement, and obtaining pharmacy records in a timely manner (Issues # 3–7). The Board also suggested to the legislature that licensed midwives could

be removed from MBC’s jurisdiction and that the legislature could create a new board to license and regulate midwives under the DCA (Issue #8).

In preparation for MBC’s Joint Sunset Oversight hearing, legislative committee staff issued a [background paper](#) for members of the respective Business and Professions committees, which provides background about the Board, updates the committees on the changes and improvements the Board made regarding the 30 issues raised during the 2016–2017 sunset review cycle and identifies 26 new issues to raise with the Board during the sunset review process.

Among its listed concerns were administrative issues, including whether MBC’s composition needs to be updated to include additional members of the public, as suggested during the February 3, 2021 Senate Rules Committee hearing (Issue #1), and whether the Board has considered the availability of mental health services for COVID-19 providers (Issue #6); budget issues, including whether the Board’s cost recovery authority should be reinstated (Issue # 8) and whether fees should be raised (Issue #9); licensing issues, including questions pertaining to the Boards postgraduate training license (Issue #11); and enforcement issues, including concerns about whether the Board is receiving mandatory reports from hospitals and other outside organizations (Issue #15), the Board’s complaint process (Issue #16), settlements (Issue #18), enforcement disclosures (Issue #20), enforcement delays (Issue #22), overprescribing and the opioid crisis (Issue #23), and the impact of the COVID-19 pandemic on the practice of medicine (Issue #24).

On March 19, 2021, the Senate Committee on Business, Professions and Economic Development and the Assembly Committee on Business and Professions held the first of two Joint Sunset Review Oversight hearings with respect to MBC. The March 19 [hearing](#), entitled “*Medical Board of California: Does the Board Protect Patients of Physicians?*” focused on the Board’s

enforcement program and lasted well over five hours ([hearing webcast](#)). The Board's president, Kristina Lawson, as well as Vice president, Dr. Howard Krauss, Executive Director, William Prasifka, Deputy Director, Reji Varghese, chief of Enforcement, Jenna Jones, and Staff Counsel Kerrie Webb presented an overview of the enforcement program to the committees. The Center for Public Interest Law's Administrative Director, Bridget Gramme, testified as an invited panelist to address an overview of patient impacts and make a series of recommendations to enhance the Board's ability to protect the public as set forth in detail in a March 3, 2021 [letter](#) to the legislature, including a public member majority on the board, the appointment of an enforcement monitor, the establishment of an ombuds office, and a licensing fee increase to ensure the Board is appropriately resourced.

Public Board member T.J. Watkins also testified to the committees, expressing his concerns that the Board too often sides with doctors in disciplinary hearings and citing his own calculations as to the frequency with which the Board departs from its disciplinary guidelines when disciplining doctors. Committee members had extensive questions for the Board with respect to patient safety, and the hearing concluded with hours of public comment, mostly from patient advocates, urging the legislature to hold the Board accountable to protect the public.

The Board's written responses to issues raised in the legislature's background paper are due on April 19, 2021. A second sunset review [hearing](#) focused on licensing issues is set for May 5, 2021. The bill that will ultimately carry the Board's sunset legislation is SB 806 (Roth); however, at this writing, it has not been substantively amended to include a sunset extension or any of the proposed reforms (see LEGISLATION).

## **Court of Appeal Sides with MBC and other State Agencies in Opioid Litigation Discovery Dispute**

On January 15, 2021, in *Board of Registered Nursing v. The Superior Court of Orange County (Johnson & Johnson)*, 59 Cal. App. 5th 1011 (2021), the Fourth District Court of Appeal [issued a peremptory writ of mandate](#) directing the Superior Court of Orange County to vacate its order compelling MBC to produce administrative records of disciplinary proceedings against doctors related to opioid prescriptions, including investigatory files and coroner's reports of opioid-related deaths that may have involved gross negligence or incompetence by a physician or surgeon, and issue a new order denying the motion to compel.

The defendant pharmaceutical companies were seeking these records from the Board pursuant to a nonparty subpoena in their ongoing litigation involving the opioid crisis, *The People of the State of California v. Purdue Pharma, L.P., et al.*, in which the Attorney General of California filed a [complaint](#) in superior court against several pharmaceutical companies on May 21, 2014. The state claimed that defendants made false and misleading statements in the marketing of opioids, falsely downplaying the risks of opioid medications and inflating their benefits, leading to a large increase in opioid prescriptions, and subsequent increased use, abuse, and deaths related to opioids. The state further alleged that this public health crisis caused by the defendant's misleading statements was in violation of the False Advertising Law, Unfair Competition Law, and various public nuisance statutes.

After several years of litigation, in early 2019, defendants served nonparty business records subpoenas on MBC, broadly seeking all documents and communications related to opioid use, opioid abuse, opioid treatment, and opioid-related disciplinary proceedings over the preceding 30

years.<sup>1</sup> The Board objected to the subpoenas on numerous grounds, and after several months of negotiations, defendants moved to compel the production of a subset of documents responsive to the subpoenas.

In opposing the motion to compel, MBC argued that, as a threshold matter, it should be denied as untimely. It also maintained that the document categories at issue were not reasonably calculated to lead to the discovery of admissible evidence and would be unduly burdensome to produce. MBC’s interim executive director stated in a declaration that the Board had undertaken more than 7,500 investigations over the past five years, that these files “invariably contain significant amounts of patients’ personal or health information,” and that “Board staff would be required to review each and every administrative case and investigatory file to determine whether they are the types of records Defendants are seeking.”

Noting the highly confidential and privileged nature of patient medical records, MBC also argued that pursuant to section 2225 of the Business and Professions Code, it is empowered to obtain documents that would otherwise be shielded from civil discovery, including communications covered by the physician-patient privilege. According to MBC, patients would have to be notified before their records were turned over. Additionally, the Board asserted that the information defendants seek in their subpoenas are protected by the official information privilege and the deliberative process privilege, and that confidentiality was essential to protect the integrity of its investigations, prevent witness intimidation, and avoid deterring future complainants or witnesses from coming forward.

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<sup>1</sup> Defendants also served nonparty subpoenas on the California State Board of Pharmacy, the California Board of Registered Nursing, and the California Department of Justice seeking similar information. This post focuses on the litigation as it applies to the Medical Board.



In response, defendants claimed that that their motions were in fact timely, and that consumer notices were not required because the Board could redact the names of consumers whose complaints or medical records are produced.

After referring the dispute to a discovery referee, the trial court largely adopted the discovery referee's recommendation overruling MBC's objections, and ordered MBC to produce five complete administrative records, 30 complete investigatory files, and all coroner's reports involving opioids, as well as additional administrative records and investigatory files if needed, explicitly including any CURES database data, which includes every prescription for a controlled substance in California over the past 30 years.

In response, along with the other state agencies subpoenaed, MBC filed a petition of writ of mandate on April 3, 2020, challenging the trial court's order compelling production (Case No. D077442). The Fourth District Court of Appeals summarily denied the petition on April 8, 2020. The Board then filed a petition with the Supreme Court of California, and on July 15, 2020, the Supreme Court granted review and transferred the matter back to the Fourth District Court of Appeal with directions to vacate the order denying the petitions and issue orders to show cause why the relief sought in the petitions should not be granted.

After full briefing, the appellate court ultimately agreed with the Medical Board and held that the trial court erred in ruling that defendants' motion to compel was timely. Specifically, the court found that because the Board is a non-party to the underlying action, the 60-day time frame in which the defendants had to move to compel a response to the subpoena began to run on the day that the Board served its objections; defendants did not file their motion until six months later. The court further held that the fact that the Board and the defendants engaged in an extended meet and confer process did not impact the 60-day timeline as it might if the Board were an actual party to

the litigation. Thus, defendants' motions were untimely, and they should have been denied on this basis.

In addition, because defendants' subpoenas sought the personal information of investigated or disciplined health care professionals, without redaction, the court held that defendants did not follow the lawful procedure in obtaining these documents. The court found that the administrative records and data sought by defendants were overly broad, violated privacy rights of record holders, and were not reasonably calculated to lead to the discovery of admissible evidence. In addition to the right of privacy, the court agreed with the Board that both the deliberative process privilege and official information privilege protected overly broad requests of government information, and thus the state agencies properly refused to produce such information.

Accordingly, the appellate court issued a peremptory writ of mandate directing the superior court to vacate its order to compel production of documents, and issue new orders denying the motion to compel. The court denied defendants' petition for rehearing on February 3, 2021. On February 24, 2021, Defendants filed a petition for review with the California Supreme Court (Case No. S267294). At this writing, that petition is still pending.

## **SB 48 Aims to Require Certain Physicians to Complete Four Hours of Continuing Medical Education for Dementia-related Treatment**

[SB 48 \(Limon\)](#), as amended on March 9, 2021, and as it applies to MBC, would amend section 2190.3 of the Business and Professions Code to require all general internists and family physicians to complete at least four hours of mandatory continuing education regarding the special care needs of patients with dementia. Currently, section 2190.3 only requires physicians who have a patient population of which over 25 percent are ages 65 or over to complete at least 20 percent

(10 hours) of all mandatory Continuing Medical Education (CME) hours in a course in the field of geriatric medicine or the care of older patients.

According to the California Chapter of the Alzheimer’s Association, the sponsor of the bill, “shortages of medical specialists [trained in treating dementia] will place an increasing burden on primary care physicians (PCP) to meet the current and future needs of individuals suffering from Alzheimer’s and other forms of dementia,” stating that “current CME requirements are insufficient to prepare PCPs to care for the growing patient population living with dementia.” In addition, according to the bill’s author, “SB 48 will ensure that as our state continues to age, all our elders will be able to receive timely, accurate and necessary diagnosis.” Both the author and sponsor also noted that while physicians subject to section 2190.3 are required to take CME hours in geriatric medicine or the care of older patients, they may not necessarily be taking CME hours in care related to dementia.

At its February 4, 2021 [meeting](#), staff presented the Board with its [analysis](#) of the potential impact of the bill, as well as the Board’s previous positions on CME-related legislation, and the Board discussed its position on the bill. Licensee member Howard Krauss raised concern that SB 48 would allow the legislature to mandate CME hours to physicians, an area typically reserved for physicians themselves to decide. Comparing SB 48 to similar legislation in the past that mandated CME training hours for pain management, Dr. Krauss cautioned that the current version of the bill would allow potentially conflicting parties, such as pharmaceutical companies, to provide the newly required CME training hours under SB 48. Other Board members voiced their agreement with Dr. Krauss. Ultimately, the Board voted to take no position on SB 48 and to draft a letter to the legislature expressing MBC’s concerns about the current version of the bill. At this writing, the bill is pending on the Senate Floor (see LEGISLATION).

# RULEMAKING

The following is a status update on recent rulemaking proceedings that MBC has initiated:

- **Substantial Relationship and Rehabilitation Criteria:** On January 21, 2021, the Office of Administrative Law (OAL) [approved](#) MBC’s proposed amendments to sections 1304, 1309, 1355.3, 1360, 1360.1, and 1360.2, and repeal of sections 1379.86, 1379.70, and 1379.72, Title 16 of the CCR to establish criteria that the Board may consider in determining whether a crime, professional misconduct, or other act by an applicant or licensee is substantially related to the qualifications, functions, or duties of the licensed professional when deciding whether to deny, suspend, or revoke a license. The action also establishes criteria for the Board to consider in evaluating whether such applicant or licensee has been rehabilitated since a criminal conviction or other act leading to denial, suspension, or revocation of a license or when considering a petition for reinstatement of a suspended or revoked license. The Board initially published [notice](#) of its intent to amend these regulations on December 6, 2019. [[25:2 CRLR 35](#)] The new regulations became effective immediately on January 21, 2021.

# LEGISLATION

- [AB 32 \(Aguiar-Curry\)](#), as amended February 12, 2021, and as it applies to MBC, would amend section 2290.5 of the Business and Professions Code to expand the definition of “synchronous interaction” for purposes of telehealth to include real-time interaction with patients, including audio-video, audio-only, and other virtual communication. According to the author, this bill would extend the telehealth flexibilities that were put in place during the COVID-19 pandemic and ensure that telehealth services are available to patients regardless of location, ability to pay, or insurance. [*A. Health*]

- [AB 107 \(Salas\)](#), as amended March 24, 2021, and as it relates to the Board, would amend section 115.6 of the Business and Professions Code, and add section 95 to the Military and Veterans Code to allow MBC, and other licensing boards under DCA, to grant temporary licenses to out-of-state licensed applicants who are married to an active-duty member of the United States military. *[A. M&VA]*

- [AB 225 \(Gray\)](#), as introduced January 11, 2021, would amend section 115.6 of, and add section 115.7 to, the Business and Professions Code. AB 225 would allow all DCA boards, including MBC, to issue a license to veterans or their spouses who have a license to practice in another state and meet other requirements. *[A. M&VA]*

- [AB 359 \(Cooper\)](#), as amended March 22, 2021, would amend sections 2177 and 2190.1 of the Business and Professions Code to authorize applicants who took more than four tries to pass Step 3 of the United States Medical Licensing Examination, but have a license in another state, to qualify for a California physician's and surgeon's license if they meet existing requirements for out-of-state licensed applicants. The bill would also loosen restrictions on CME to allow for courses that include practice and office management, coding, reimbursement, and education methodology. The bill is co-sponsored by the Choice Medical Group and the California Medical Association. According to the author, this bill would increase access to physicians and surgeons, ensure physicians in California receive CME credit for the professional work they do to improve patient care, and create an equivalent framework in California with CME nationally. *[A. Floor]*

- [AB 443 \(Carillo\)](#), as amended March 11, 2021, and as it applies to MBC, would add section 2065.5 to the Business and Professions Code to require the Office of Statewide Health Planning and Development under the California Health and Human Services Agency, in

consultation with MBC and other stakeholders, to develop requirements for qualification for an international medical graduate integration license for the practice of medicine. The bill would authorize the Board to issue an international medical graduate integration license if it determines that an applicant is qualified, and if they commit to practice primary care in a rural or underserved area. According to the author, this bill would open up more educational opportunities to international health professionals while making linguistically and culturally competent care available to the Californians that need it most. *[A. B&P]*

- [AB 1278 \(Nazarian\)](#), as amended April 15, 2021, would add Article 6.5 (commencing with section 660) to the Business and Professions Code to require a physician to disclose and provide notice to patients regarding payments received from drug or device companies as disclosed on the federal Centers for Medicare and Medicaid Services Open Payments Database. The Center for Public Interest Law is the sponsor of the bill. Its purpose is to ensure that patients are aware of and have access to this important information to aid them in making critical decisions about their own health care. *[A. Appr]*

- [SB 40 \(Hurtado\)](#), as amended March 16, 2021, would add and repeal Article 2.8 (commencing with section 127960) to the Health and Safety Code to require the Office of Statewide Health Planning and Development to establish and facilitate the California Medicine Scholars Program, a 5-year pilot program that would commence on January 1, 2023. The Program would establish a regional pipeline for community college students to pursue premedical training and enter medical school. According to the author, the bill will create physicians that “will care for patients in vulnerable and underserved communities. These physicians will also come from backgrounds that will help provide them with an understanding of the way of life in those

communities, which is integral to enabling them to help stop or limit the impact of future pandemics.” *[S. Appr]*

- [SB 48 \(Limon\)](#), as amended March 9, 2021, and as it applies to MBC, would amend section 2190.3 of the Business and Professions Code to require physicians and surgeons to complete continuing education on the special needs of patients with dementia (*see* HIGHLIGHTS). *[S. Floor]*

- [SB 57 \(Weiner\)](#), as amended March 25, 2021, would add and repeal section 11376.6 of the Health and Safety Code to authorize the City and County of San Francisco, the County of Los Angeles, and the City of Oakland to approve entities to operate overdose prevention programs until January 1, 2027. The bill would also clarify that MBC is authorized to take disciplinary action against a licensee related to the operation of an overdose prevention program that violates the Medical Practice Act. According to the author, current law hampers the ability of local jurisdictions to create these programs, which have been proven to be very effective in preventing and mitigating overdose deaths. This bill would provide these jurisdictions with the discretion to start a program. *[S. Floor]*

- [SB 310 \(Rubio\)](#), as amended on April 8, 2021, would add Article 26 (commencing with section 2529.7) to the Business and Professions Code, and add Division 117 (commencing with section 150400) to the Health and Safety Code to establish the Cancer Medication Recycling Act for the collection and redistribution of unused cancer medications. Additionally, the bill would require MBC to create a registry for participating practitioners, including developing both a donor and a recipient form containing specified information. According to the author, the bill would expand cancer medication access to patients in dire need, reduce improper drug waste, and have the potential to save lives. *[S. Appr]*

- [SB 806 \(Roth\)](#), as introduced on February 19, 2021 is the intended legislative vehicle for the Board’s sunset extension. At this writing it has not been amended to amend the Medical Practice Act, but it is anticipated to be amended during the upcoming committee process. A hearing is set for April 19, 2021. *[S. BP&ED]*